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United States

OCTOBER TERM, 1979

NO. 79-1162

MARIO CUEVAS, LOUIS ZE CAVE, SALVADOR ZERMENO, OSCAR HERNANDEZ, AND JAMES B. BUTLER,

Petitioners,

vs.

THE STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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TO: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

The Petitioners, Mario Cuevas, Louis Ze Cave, Salvador Zermeno, Oscar Hernandez, and James B. Butler respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia entered in this proceeding on September 11, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Georgia, entered on September 11, 1979, affirming the decision of the Superior Court of Liberty County, Georgia, in the Atlantic Judicial Circuit, is not yet reported and appears in the Appendix hereto.

The record of the Petitioners' bench trial dated October 12 and 13, 1978, is with the Superior Court of Liberty County, Hinesville, Georgia. No opinion was rendered by the Superior Court.

JURISDICTION

The decision of the Court of Appeals of the State of Georgia was entered on September 11, 1979. A timely Petition for Rehearing was denied on October 3, 1979. The Supreme Court of Georgia denied a Petition for a Writ of Certiorari to the Court of Appeals on October 31, 1979, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. Whether a search warrant which fails to identify the county in which the search is to take place, particularly describes the place to be searched as required by the Fourth Amendment.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioners, Mario Cuevas, Louis Ze Cave, Salvador Zermeno, Oscar Hernandez, and James B. Butler were arrested on March 13, 1978 in Liberty County, Georgia. A Motion to Suppress Evidence was argued in the Superior Court of Liberty County, Hinesville, Georgia, on October 12 and 13, 1978, in order to exclude from trial all evidence seized from a warehouse pursuant to a search warrant which failed to designate the county in which the warehouse was located. The warrant was issued by the Justice of the Peace of Liberty County, Georgia, on March 14, 1978, and commands "all peace officers of the State of Georgia . . . to search forthwith" the aforementioned warehouse based upon the following:

> Affidavit having been made before me by *"John Dasher"* (handwritten), an officer charged with the duty of enforcing the Criminal laws, that he has reason to believe

> that in (space left blank) County, Georgia on the following described premises: (following handwritten)
>
> "A concrete block warehouse located on Ga. Hwy. 38 appx. 3/10 of a mile east of the SCL Railroad tracks and bearing a sign 'Coastal Sign Co.' and a metal building with overhead door located next to the warehouse and the curtilege of these buildings."
>
> and in the following described vehicle:
>
> "an enclosed truck, red cab, white body, International Harvester make, bearing GB 3761, Mississippi plates parked next to the above warehouse and a two door Thunderbird auto maroon over gray color, Ga. tag NCH 683."
>
> There is now located certain property, namely:
>
> "marijuana"
>
> which is:
>
> "contraband, the possession of which is illegal."

Counsel for petitioners argued that the above warrant failed to meet the Fourth Amendment's requirement that the place to be searched be particularly described and was therefore invalid (Trial Transcript p. 274-7). The Motion to Suppress was denied by the trial judge without comment as to his

reasoning on this issue (Trial Transcript p. 286). A bench trial was conducted on that same date, October 14, 1978, with the petitioners having a standing objection to the introduction of any evidence seized pursuant to the alleged invalid search warrant (Trial Transcript, p. 288), and they were convicted of one count each of possession of marijuana with the intent to distribute (Trial Transcript p. 304). They were sentenced to ten years in the State Penitentiary, three of which were suspended, leaving seven to serve. The Petitioners filed a Motion for a New Trial raising the identical issue which was denied by the trial court on January 19, 1979. On the 15th day of February, 1979, Petitioners filed their Notice of Appeal to the Court of Appeals of Georgia in the Liberty County Superior Court.

The Georgia Court of Appeals affirmed the judgment of the trial court in an opinion issued on September 11, 1979. The appellate court agreed with the Petitioners' argument that a search warrant, in order to meet the requirements of the Fourth Amendment, "must describe the location of a property to be searched with such exactitude as to allow a prudent officer to locate the place definitely and with reasonable certainty", yet they held that this warrant was not subject to the objection made because it identified, by a handwritten entry the county in which the warrant was to be executed (Court of Appeals opinion; attached as Appendix hereto App. p. 10).

A timely Motion for Rehearing was filed by petitioners pursuant to Rule 33(f), Rules of the Georgia Court of Appeals, respectfully submitting that the Georgia appellate court had apparently confused the

Affidavit for Search Warrant with the Search Warrant itself. The Affidavit identifies the county in which the warehouse is located while the warrant does not. This Motion for Rehearing was denied without opinion by the Georgia Court of Appeals on October 3, 1979.

A Petition for Writ of Certiorari to the Georgia Court of Appeals was filed in the Supreme Court of Georgia alleging the invalidity of the warrant to search the warehouse because of its failure to comply with the Fourth Amendment mandate that the place to be searched be particularly described. The Georgia Supreme Court denied the writ without opinion on October 31, 1979.

REASONS FOR GRANTING THE WRIT

1. THE GEORGIA COURT OF APPEALS HAS UPHELD THE VALIDITY OF A SEARCH WARRANT WHICH, BY FAILING TO IDENTIFY THE COUNTY IN WHICH THE SEARCH WAS TO BE MADE, DID NOT MEET THE FOURTH AMENDMENT REQUIREMENT THAT THE PLACE TO BE SEARCHED BE DESCRIBED WITH PARTICULARITY.

The Fourth Amendment to the Constitution provides, ". . . and no warrants shall issue but upon probable cause, . . . and particularly describing the place to be searched . . . " The Court of Appeals for the District of Columbia has stated that this "requirement is specific, and derives from the fierce and implacable resentment against the issuance, in colonial times, of general warrants and 'writs of assistance'." *Moore v.*

United States, 461 F.2d 1236 (D.C. Cir. 1972). This Court has stated that the use of such "general warrants" was a motivating factor behind the Declaration of Independence. By the use of these "general warrants" customs officials were given "blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown." The Fourth Amendment's requirement of particularity in the description of the place to be searched, and the persons or things to be seized, "repudiated these general warrants and makes general searches impossible and prevents seizure of one thing under a warrant describing another." *Berger v. State of New York,* 388 U.S. 41 (1967), citing from *Marron v. United States,* 275 U.S. 192 (1927).

With respect to the degree of specificity required of a search warrant's description of premises to be searched, this Court has stated, "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States, No. 1,* 267 U.S. 498, 503 (1925); See also *United States v. Bowling,* 351 F.2d 236 (6th Cir. 1965), cert. denied, 383 U.S. 908 (1966); *United States v. Davis,* 557 F.2d 1239, 1248 (8th Cir. 1977), cert. denied, 434 U.S. 1971 (1977). The Fifth Circuit Court of Appeals in *United States v. Darensbourg,* 520 F.2d 985, 987 (5th Cir. 1975), quoted with approval from *United States v. Sklaroff,* 323 F.Supp. 296 (S.D.Fla. 1971) as follows:

> ". . . the determining factor as to whether a search warrant describes the premises to be searched with sufficient particularity is not whether the description given is technically accurate in every detail but rather whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched under the warrant."

The warrant in the case sub judice contains a description of the premises to be searched which is patently ambiguous, and cannot lead a law enforcement officer, even with reasonable effort, to the place to be searched. The Fourth Amendment safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude all others. *United States v. Lemmens,* 527 F.2d 662 (6th Cir. 1976). The search warrant commands all "peace officers of the State of Georgia" to search a specific warehouse, yet it is not reasonable to expect that any law enforcement officer in the State of Georgia could determine the location of the warehouse based upon the description of the place contained in the search warrant. The validity of a search warrant depends upon the showing made before the magistrate at the time of its issuance. *Schiller v. United States,* 35 F.2d 865 (9th Cir. 1929); *United States v. Hinton,* 219 F.2d 324 (7th Cir. 1955). A description of a warehouse ". . . located on Georgia Highway 38 approximately 3/10 of mile east of the SCL railroad tracks . . . ", without any indication as to what county the warehouse is located in, cannot be considered as meeting the Fourth Amendment mandate that the place to be searched be described with particularity.

Both Georgia Highway 38 and the Southern Coast Line railroad tracks transverse the entire State of Georgia, and to expect any law enforcement officer in the State to be able to locate a "concrete warehouse" with particularity on Highway 38 near the SCL tracks is entirely unreasonable.

The Court of Appeals of Georgia, in their opinion issued on September 11, 1979, agreed with the petitioner's argument that a search warrant must sufficiently describe the place to be searched, but that the warrant at issue was valid because it designated the county in which the search was to be made (App. opinion App. p. 10). It is apparent that the Georgia appellate court confused the Affidavit with the Search Warrant because the space where the county in which the search was to take place is left conspicuously blank, and there is no further indication in the warrant in which county the warehouse to be searched was located. The Georgia Court of Appeals cited the case of *Vaughn v. State*, 141 Ga. App. 453, 233 S.E. 2nd 848 (1977) to support their position, however, this case held that a general description of the place to be searched with the county similarly left blank was insufficient and, thus, the warrant was void.

It is counsel for petitioner's contention that the Georgia appellate court would have invalidated the warrant in the case at bar on the basis of their holding in *Vaughn v. State*, supra, if they had noticed the identical defect which the warrant in *Vaughn* had in common with the warrant at issue.

The description of the place to be searched must be sufficiently clear so that the property to be searched is

recognizable from other neighboring properties. *United States v. Pisano*, 191 F.Supp. 861 (S.D.N.Y 1961) A warrant faulty by reason of its failure to specify the place to be searched should not be approved because only the premises of the petitioners were actually searched in pursuance thereof. If the protection of the Fourth Amendment is measured in retrospect, it is a hollow protection indeed. The purpose of interposing a judicial officer between the citizenry and law enforcement officials is to protect from searches everyone except those against whom probable cause has been demonstrated. "If, however, a warrant purporting to authorize a search is sufficiently ambiguous that it is impossible to identify with a reasonable degree of certainty the particular premises authorized to be searched, the warrant may not be executed and any search pursuant to it is illegal, whether of the premises actually intended or not, because of the danger that the privacy of unauthorized premises will be invaded." *State v. Blackburn*, 511 P.2d 381 (Sup.Ct.Ore. 1973); See also *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

In the case *sub judice*, although the search warrant does not designate the county in which the warehouse is located and where the search is to be made, the affidavit for the warrant does contain the handwritten entry, "Liberty County". However, there is a fundamental distinction between the warrant and the underlying affidavit, and the affidavit is not necessarily either part of the warrant or available for defining the scope of the warrant. *United States v. Kaye*, 432 F.2d 647 (D.C.Cir. 1970); *Ledbetter v. United States*, 211 F.2d 628 (D.C. Cir. 1954), cert. denied, 347 U.S. 977 (1954).

In certain instances, the warrant may properly be construed with reference to an affidavit for purposes of providing the particularity of the premises to be searched, provided "(1) the affidavit accompanies the warrant, and in addition (2) the warrant uses 'suitable words of reference' which incorporate the affidavit by reference." *Moore v. United States*, 461 F.2d 1236 (D.C.Cir. 1972) citing *United States v. Snow*, 9 F.2d 978, 979 (D.Mass. 1925). The warrant in the instant case was not accompanied by the affidavit and the warrant itself does not contain any language of incorporation which would lead an officer to examine the affidavit for search warrant in order to accurately locate the premises to be searched, and, therefore, the affidavit cannot be used to define the scope of the warrant.

This Court stated many years ago that "the proceeding by search warrant is drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual. *Sgro v. United States*, 287 U.S. 206 (1932). It is apparent that the Georgia Appellate Court has erroneously upheld as valid a "general warrant" which fails to meet the express requirement of the Fourth Amendment of describing with particularity the place to be searched.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 1980, a copy of this Petition for Writ of Certiorari was mailed to Mr. Arthur K. Bolton, Attorney General, Judicial Building, Room 132, Atlanta, Georgia, 30334 and to Mr. DuPont K. Cheney, District Attorney, P.O. Box 653, Hinesville, Georgia 31313. I further certify that all persons required to be served have been served.

ESSEN & SPIEGEL, P.A.

By: RICHARD ESSEN
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For the Firm

APPENDIX

58015. CUEVAS et al. v. THE STATE

QUILLIAN, Presiding Judge.

The defendant and his four companions appeal their conviction of one count of possession of marijuana with intent to distribute. Deputy Sheriff Dasher, of Liberty County, was patrolling on the evening of March 13, 1978, at approximately 10:30 p.m. when he observed someone walking in the area of a warehouse in which all of the lights were off. He "didn't know whether they were breaking in or what, so [they] stopped to check it out." It was the owner, Sue Youngblood, who advised them "everything was alright." They were aware of her previous "record." The deputy stated: "We realized something wasn't right . . . " They set up surveillance across the road. A red and silver Thunderbird automobile entered the warehouse area and Sue Youngblood talked to them. She said something about "money" to the driver. The car left and a red and white truck came in and left. Later, a large "white van type truck" backed up to the warehouse door and began unloading its cargo. The deputy sheriff was familiar with marijuana bales from earlier investigations and these "appeared to be bales of marijuana being off-loaded and put into the Coastal Sign warehouse."

When the white van left he radioed Deputy Sheriff Groover and advised him "to stop the truck . . . see if they would give us permission to search the truck, if not we would get a search warrant." Deputy Groover saw

the truck approach and he fell in behind for a short distance and then pulled them over. Deputy Dasher had already radioed him that "they were unloading marijuana" at the Coastal Sign warehouse. Defendant Cave was driving and one of the other defendants was a passenger. He asked Cave for his driver's license. It was a Florida license and Cave "talked like he was a foreigner." It was noted that the truck had dual wheels.

Deputy Groover asked defendant Cave if he would mind opening up the doors to the back of the truck. Defendant Cave hesitated and Groover stated: ". . . I told him if he didn't want to open the truck that I would get a search warrant to open it." Cave produced the keys and unlocked the rear door. The remaining three defendants were inside. All five defendants were placed in the rear of the patrol car and deputy Groover saw "marijuana seeds" and "strings from burlap bags" in the back of the truck. He entered the truck and found three loaded pistols.

With the combined knowledge that the white van truck with dual wheels, had been intercepted headed east on I-95, toward the coast, and that the driver spoke with a foreign accent and had a Florida driver's license, all deputy sheriffs began looking for dual wheel tracks leading from the highway to the coastal area. Deputy Stagmeier, after checking several coastal locations, found dual wheel tracks leading toward "Sunbury" and called the GBI agent in charge of the investigation. When the GBI agent arrived they followed the dual wheel tracks to "Morgan's Dock" where they observed approximately eight boats. It was then between 5 and 5:30 a.m. in the morning. The police located a Don

Drake on the boat "High Noon." They talked to him about what he had seen and then took a statement from him that he had talked to two people who said they "planned to . . . bring in some stuff." One of them called Miami and then they took on about 1000 gallons of fuel, but did not take any ice, aboard the shrimp boat Miss Carol J and departed. After the Carol J returned one man stated "that we are going to deal tonight between 7:30 and 8:00 p.m." That evening one of them drove up in his grey and burgandy Thunderbird and then a red and white truck arrived and finally a creme colored Ford van truck arrived. Four armed "spanish or mexican" males got out of the last truck and they began to unload "bales wrapped in 'krocker' sacks from the hold in the Carol J and load them on" the trucks. Drake stated that he went on the Carol J "and saw several bales still in the hold." A justice of the peace came to the dock area, swore the afiants, then issued the search warrants for the Carol J and the Coastal Sign warehouse. He did not participate in the subsequent search. A search of the Carol J revealed 162 bales of marijuana, approximately two tons, in two of the three holds of the ship. A search of the Coastal Sign warehouse turned up 403 bales of marijuana. The defendants appeal their conviction.

Held:

1. The defendants enumerate but one error — that the trial court erred in denying their motion to suppress the evidence which they contend "was obtained as the direct result of a series of illegal searches and seizures conducted without probable cause." However, they subdivide this enumeration into five separate claims.

A. It is urged that there was a lack of probable cause to search the defendants truck. This enumeration does not face the principle issue: "Was the search of the truck legal?" We find that it was, as there was a valid consent and probable cause existed to make the search.

Warrantless searches of motor vehicles have always been based on different criteria than those of an individual's home. The principal basis has been the mobility of the auto makes it impractical to immediately secure a warrant. Carroll v. United States, 267 U.S. 132, 153-154 (45 SC 280, 69 SE 543). Less stringent requirements govern search of motor vehicles because the expectation of privacy in one's auto is significantly less than in one's home. South Dakota v. Opperman, 428 U.S. 364, 367 (96 SC 3092, 49 LE2d 1000). However, there are other exceptions to the warrant requirement: 1. consent, 2. incident to lawful arrest, and 3. probable cause with exigent circumstances. United States v. Jeffers, 342 U.S. 48 (72 SC 93, 96 LE 59).

In the instant case the police officials observed from neutral ground (across the road) the developments that aroused their suspicion. A trained police officer, with previous experience in investigations involving bales of marijuana, saw what he though to be bales of marijuana being unloaded from a white van type truck. This is a sufficient basis for probable cause to stop and search the truck for evidence of residue of marijuana, for as the term implies—in dealing with probable cause the police officer deals with probabilities. *Sanders v. State*, 235 Ga. 425, 440 (219 SE2d 768); *Kiraze v. State*, 147 Ga.App. 832, 833 (SE2d).

It is not determinative that the officer himself thought that he did not have probable cause to search. Probable cause is not to be determined by law enforcement officials but a neutral, detached magistrate. Coolidge v. New Hampshire, 403 U.S. 443 (91 SC 2022, 29 LE2d 564). The defendant may be anxious to accord undue weight to this officer's opinion that he did not have probable cause, but if a police officer's opinion was controlling, it is doubtful that any searches in the future would ever be found unreasonable as law enforcement officials almost always appear to believe they have probable cause to search.

The criterion is whether, at that moment, the facts and circumstances within his knowledge and of which he had reasonably trustworthy information, including information from other police officers (Whiteley v. Warden, 401 U.S. 560, 568 (91 SC 1031, 28 LE2d 306)), were sufficient to warrant a prudent person in believing the defendants had or were committing an offense. Beck v. Ohio, 379, U.S. 89, 91 (85 SC 223, 13 LE2d 142). We find that there was probable cause.

Secondly, a valid consent search was established. No one could seriously contest the conclusion that suspicious activities were taking place at a late hour in a formerly closed warehouse involving a person with a known criminal background. A Terry-type stop was authorized because of the founded and articulable suspicion that the defendants possessed contraband. Adams v. Williams, 407 U.S. 143, 146 (92 SC 1921, 32 LE2d 612). The officer testified: "I asked him if he minded opening the truck up or the back of the truck, that I wanted to see in the back of the truck. Q. Okay,

what did he say? A. He hesitated and then I told him if he didn't want to open the truck that I would get a search warrant to open it . . . He reached in his pocket pulled out a key and unlocked the door . . ."

Consent searches are valid (Davis v. United States, 328 U.S. 582, 583 (66 SC 1256, 90 LE 1453)) but where the state relies upon consent, the burden is upon them to demonstrate that the consent was voluntary, and not the result of duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218 (93 SC 2041, 36 LE2d 854). Voluntariness must be determined from all of the circumstances. *Brand v. State,* 129 Ga. App. 747, 748 (201 SE2d 180). The record discloses the officer did not draw his pistol, or use threatening or coercive language. He made a statement of fact, in essence: "Consent, or I will get a search warrant." Probable cause existed for the issuance of such a warrant and we see no obstacle to the procurement of a valid search warrant if one had been required. Where the statement is made that the subject can consent or a search warrant will be procured, if true, this does not amount to duress or coercion as would invalidate the subsequent search. *Bailey v. State,* 147 Ga. App. 621, 622 (249 SE2d 675); *Code v. State,* 234 Ga. 90 (III) (214 SE2d 873); see also *Guest v. State,* 230 Ga. 569, 571 (198 SE2d 158). "[T]he trial judge was authorized to find that the consent was not the product of coercion, duress or deceit." *Code v. State,* 234 Ga. 90, 95, supra.

B. It is alleged that "[t]he search of Morgan's Dock was accomplished by an illegal trespass upon private property and as such any evidence found was tainted and subject to suppression." Defendant's

enumeration is fatally flawed in three aspects. First, there was no search of Morgan's Dock. Second, there was no trespass. Third, even if there were a trespass, defendants would have no right to avail themselves of such act as a ground for suppression of contraband found on their boat.

There was no search of Morgan's Dock. The officers merely followed dual wheel tracks from a public road onto Mr. Morgan's property (a road) and thence to his business establishment — the dock area. No search was made of the dock itself. The officers were looking for a boat capable of transporting a large amount of marijuana into the United States Mr. Morgan was present during the latter part of the investigation and made no objection. The officers were in the execution of their office in the investigation of a crime that had been committed in their presence at the Coastal Sign warehouse. See 87 CJS 1006, Trespass §§54, 55. *They were always on business property generally used by and open to the public* — where a person lawfully on the premises is generally considered to be an invitee. See Code Ann. § 105-401 (Code § 105-401). There was no trespass in the sense that there was un unlawful intrusion upon private property, or injury to another's property. United States v. Hanahan, 442 F2d 649 (7th Cir. 1971); United States v. Conner, 478 F2d 1320 (7th Cir. 1973); see generally 27 EGL 428, Trespass §§2, 3.

Last and most important, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."

Rakas v. Illinois, U.S. (99 SC, 58 LE2d 387, 395). The dock area belonged to Mr. J. W. Morgan—not the defendants. Allegations of illegal searches, in violation of the Fourth Amendment, are personal rights which may not be asserted vicariously. Alderman v. United States, 394 U.S. 165, 174 (89 SC 961, 22 LE2d 176). In Rakas, the Supreme Court held that the test of standing to object to searches by one "legitimately on [the] premises"—as stated in Jones v. United States, 362 U.S. 257 (80 SC 725, 4 LE2d 697) will no longer be followed. They affirmed the rule of Katz v. United States, 389 U.S. (88 SC 507, 19 LE2d 576) that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 58 LE2d 401, supra. The defendant's asserted "neither a property nor a possessory interest in the [dock] . . . [S]ince they made no showing that they had any legitimate expectation of privacy" in the dock area—a public business generally open to the public, they have not suffered a violation of any Fourth Amendment right. 58 LE2d 404, supra.

C. The warrant to search the Miss Carol J was not invalid for a lack of showing of probable cause that the vessel contained contraband. The police officer had observed what he thought to be bales of marijuana being unloaded from a dual wheeled truck. The search of the truck confirmed that seeds and burlap strings were present in the truck. The truck and its personnel had been stopped during a trip which could have been one of a series of trips. The only dual wheeled tracks leading to

the ocean area led to Morgan's Dock. A witness, Don Drake, stated in an affidavit that he had seen the white van truck come to the dock and "four Spanish or Mexican males get out. All of them were wearing pistols . . . [He] heard [one person] tell [another person] that he would meet them at the warehouse. [He watched as they began to unload bales wrapped in 'krocker' sack from the hold in the Carol J." After they loaded the first truck another truck was "loaded to the gills . . ." and the driver said "lets go to the warehouse . . ." "[He] went on the Carol J and saw several bales still in the hold."

The test for probable cause is "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendants] had committed or [were] committing an offense." *Sanders v. State,* 235 Ga. 425, 439, supra. We find probable cause to search the Carol J was present.

D. It is alleged that the warrant authorizing the search of the warehouse was void "because it failed to designate the county in which the warehouse was located and where the warrant was to be executed." Defendants argue that a search warrant "must describe the location of the property to be searched with such exactitude as to allow a prudent officer to locate the place definitely and with reasonable certainty." Therefore, they contend the "fact that the county in which the warehouse to be searched was left blank in the warrant is a fatal defect and renders it void."

The warrant in the record of trial states: ". . . I am an Officer of the State of Georgia or its political subdivisions charged with the duty of enforcing the Criminal Laws and that I have reason to believe that in *Liberty* [handwritten] County, Georgia on the following described premises: a concrete block warehouse located on Ga. Hwy. 38 appx. 3/10 of a mile east of the SCL Railroad Tracks and bearing a sign 'Coastal Sign Co' and a metal building with overhead door located next to the warehouse and the curtilage of these buildings." The warrant was subscribed and sworn to by John Dasher, Deputy Sheriff, before an Ex-Officio Justice of the Peace.

The warrant is not subject to the objection made. The warrant designates the county in which the warehouse is located and is entered therein by a handwritten entry in the same manner as the remainder of the information. The United States Supreme Court and our appellate courts in Georgia are in agreement that "[a] search warrant sufficiently describes the place to be searched if it enables the officer with reasonable effort, to identify it." Steele v. United States, 267 U.S. 498 (2) (45 SC 414, 69 LE 757); *Strauss v. Stynchcombe,* 224 Ga. 859, 866 (165 SE2d 302); *Vaughn v. State,* 141 Ga. App. 453, 454 (233 SE2d 848). The description contained in the warrant complies with the law. See Code Ann. §27-303 (Ga. L. 1966, pp. 567, 568); *Fomby v. State,* 120 Ga. App. 387 (170 SE2d 585) (Cert. den.; U.S. cert. den. 397 U.S. 1008).

E. Defendants contend the warrant's affidavit to search the warehouse "contained a material misstatement known by the affiant" and includes

information from "prior illegal searches" or "an invalid warrant." We have determined that the prior search of the white van truck was permissive and the warrant for the search of the warehouse was not invalid because of the claimed lack of designation of a county. The warrant for the Miss Carol J was based in part on the statement of Don Drake who was at Morgan's Dock when the police arrived. His statement included the assertion that after the others had loaded the bales aboard the trucks and left: "I went on the Carol J and saw several bales still in the hold." Officers removed 162 bales of marijuana from the holds of the Carol J. Defendants argue that "it is obvious that Drake's statement that he went aboard the boat and saw 'several' bales is not true." Thus, he contends "the warrant issued *to search the warehouse* was subsequently tainted and thus invalid." (Emphasis supplied.)

We emphasize that no argument is made that the statement relating to "several" bales of marijuana remaining aboard the Carol J. tainted the search of the shrimp boat. The argument is advanced that the statement was so inaccurate as to be patently false which was discovered by the officers after they searched the Carol J, thus — the allegedly false statement tainted the subsequent search of the Coastal Sign warehouse by stating in the application for that warrant that a search of the Carol J "has revealed apprx. 2 tons of baled marijuana." We do not agree.

In Franks v. Delaware, U.S. (98 SC, 57 LE2d 667, 672), the Supreme Court held "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless

disregard for truth, was included in the warrant affidavit, and *if the allegedly false statement is necessary to the finding of probable cause,* the Fourth Amendment requires that a hearing be held at the defendant's request. In the event at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." (Emphasis supplied.)

Pretermitting the issue of whether the statement by Don Drake was false or made with reckless disregard for the truth, with that evidence disregarded the remaining factual criteria adequately establish probable cause to search the Coastal Sign warehouse. Accordingly, under Franks v. Delaware, supra, the search warrant was not invalidated even if the Drake statement were excluded. This enumeration is without merit.

Judgment affirmed. Smith and Birdsong, JJ., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, October 3, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

58015. Mario Cuevas et al. v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

OCT 3

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS
CLERK

Supreme Court, U. S.
FILED
MAR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1162

MARIO CUEVAS, LOUIS ZE CAVE, SALVADOR ZERMENO, OSCAR HERNANDEZ, and JAMES B. BUTLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a search warrant, identifying the county to be searched in the supporting affidavit and describing with particularity the place to be searched within the body of the warrant itself meets the requirements of the Fourth Amendment?

PART ONE

STATEMENT OF THE CASE

Petitioners, Mario Cuevas, Louis Ze Cave, Salvador Zermeno, Oscar Hernandez and James B. Butler, were convicted in the Superior Court of Liberty County, Georgia, on one count of possession of marijuana with intent to distribute. On appeal to the Court of Appeals of Georgia, Petitioners cited as error the denial by the trial court of their motion to suppress evidence which they asserted was obtained as the result of a series of illegal searches and seizures which were made without the necessary probable cause. The searches and seizures alleged to have been illegally conducted were made following the issuance of a search warrant by a justice of the peace on March 14, 1978 at 9:15 a.m. The search warrant itself was entitled with the words "Sheriff's (handwritten) Department", "Search Warrant", "Georgia, Liberty (handwritten) County", "Justice of Peace (handwritten) Court". The search warrant was addressed to "All Peace Officers of the State of Georgia" and the body of the search warrant read in pertinent part as follows:

> "Affidavit having been made before me by John Dasher (handwritten), an officer charged with the duty of enforcing the Criminal Laws, that he has reason to believe that in_____ (blank space) County, Georgia on the following described premises:

> A concrete block warehouse Located on Ga. Hwy. 38 approx. 3/10 of a mile east of the SCL Railroad tracks and bearing a sign 'Coastal Sign Co." and a metal building with overhead door located next to the warehouse and the curtilage of these buildings and in the following described vehicle: an enclosed truck, red cab, white body, International Harvester make, bearing GB 3761, Mississippi plates parked next to the above warehouse and a two door thunderbird auto, maroon over grey color, Ga. tag NCH 683.(handwritten) There is now located certain property, namely Marijuana (handwritten) which is contraband, the possession of which is illegal. (handwritten)" [1/]

The trial court found that the search warrant was legally sufficient to enable the officers to ascertain and identify the place intended with reasonable certainty. The trial court noted that the supporting affidavit of the search warrant indicated that the location was Liberty County

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[1/] A certified copy of the original search warrant and affidavit in support of the search warrant was submitted to the Clerk of this Court along with the required number of briefs to this Court, should this Court wish to use the original search warrant which was considered by both the trial and appellate court in Georgia.

and that the face of the search warrant itself had the caption "Liberty County". The affidavit for the search warrant was captioned Liberty County and identified the premises to be searched as being in Liberty County, Georgia. The trial court further noted that the body of the search warrant specifically described the location of the warehouse to be searched so as to allow a law enforcement officer to "locate the place definitely and with reasonable certainty." The Georgia Court of Appeals considered Petitioners' enumeration of error in support of their allegation that illegal searches and seizures had been conducted. Petitioners enumerated five separate claims as the basis for error to the Court of Appeals of Georgia but now seek review from this Court only as to whether or not searches and seizures were invalid due to the fact that Petitioners claim that the warrant did not designate the county in which the warehouse was located or where the warrant was to be executed. The Georgia Court of Appeals determined that the description contained in the warrant complied with both Georgia law and federal law.

Respondent relies on the statement of facts as set forth in the opinion of the Court of Appeals of Georgia attached as an appendix to the brief of the Petitioners and will refer to this statement of the facts in discussing the allegation raised by the Petitioners before this Court.

PART TWO

REASON FOR NOT GRANTING THE WRIT

THE GEORGIA COURT OF APPEALS PROPERLY HELD THAT THE SEARCH WARRANT WAS ISSUED IN ACCORDANCE WITH FOURTH AMENDMENT REQUIREMENTS.

Petitioners argue that the Court of Appeals of Georgia improperly upheld the validity of the search warrant issued in this case. Petitioners contend that the search warrant did not meet the Fourth Amendment requirement that the place to be search must be described with particularity.

Petitioners cite this Court's decision in Steele v. United States, 267 U.S. 498, 503 (1925), as setting out the standard by which a search warrant's description must be judged. This standard is the same standard utilized by the Court of Appeals of Georgia in upholding the description contained in the search warrant issued in the instant case. This Court stated in Steele v. United States, supra, that "It is enough if the description is such that the officer can, with reasonable effort ascertain and identify the place intended." The Georgia Court of Appeals noted that this was not only the federal standard, but also the standard adopted by the appellate courts in Georgia. The Court of Appeals of Georgia also noted that under Ga. Code Ann. § 27-303, relating to the grounds for the proper issuance of a search warrant, a law enforcement officer must

make a written complaint ". . . which particularly describes the place or person, or both, to be searched and things to be seized. . ."

Therefore, as Petitioners cite as the applicable standard, the same standard utilized by the Court of Appeals of Georgia, the only issue left for resolution is whether or not the standard for evaluating the validity of a description in a search warrant was properly applied by the Court of Appeals of Georgia.

For the purpose of interpreting this standard for evaluating a search warrant's description of the premises to be searched, Petitioners cite United States v. Darensbourg, 520 F.2d 985 (5th Cir. 1975). A portion of the Court's decision in United States v. Darensbourg, supra, not quoted by Petitioners, cites a decision of this Court in support of its interpretation of the proper standard to be applied. The Court of Appeals for the Fifth Circuit stated:

> "The test is one of reasonableness and '[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.' U.S. v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684, 689 (1965)."

Respondents assert that under the reasonableness test, the description in the search warrant in this case meets the Fourth Amendment requirements, even if there may be technical

defects in the specific details of the warrant. The search warrant itself has the caption, "Liberty County," even though the applicable county is left blank in the body of the search warrant. Furthermore, the actual premises to be searched are described in detail in the body of the search warrant. The description includes the exact location (Hwy. 38, 3/10 of a mile east of the SCL railroad tracks), a physical description of the warehouse (concrete block bearing a sign "Coastal Sign Co.") and a description of what was in the curtilage (a metal building with an overhead door; an enclosed truck, red cab, white body, International Harvester make, bearing GB 3761 Mississippi plates; and a two door Thunderbird automobile, maroon over grey, Georgia Tag NCH 683).

Additionally, the affidavit upon which the serach warrant is based contains the information which Petitioner contends was lacking in the search warrant itself. The affidavit is captioned "Liberty County" and also indicates that the premises to be searched are in Liberty County.

Petitioners complain that the Court of Appeals of Georgia improperly cited Vaughn v. State, 141 Ga. App. 453 (1977) in support of its decision upholding the search warrant. Petitioners state that the warrant in the instant case suffers from the "identical defect" which invalidated the search warrant in Vaughn v. State, supra. The Court of Appeals noted in Vaughn v. State, supra that, "No designation is made as to any city, county or state as to the location of said 'house trailer,' but the affidavit was sworn to by the deponent before a justice of the peace in Hall County." Id. at 454. The search warrant in the instant

case is clearly distinguishable from the warrant in Vaughn, as the search warrant designates Liberty County, Georgia as the location of the premises to be searched as does the supporting affidavit. In Vaughn v. State, supra, the affidavit contained neither the city, county or state in which lay the premises to be searched.

In United States v. Avarello, 592 F.2d 1339 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit reviewed two of its former decisions upholding the descriptions of premises to be searched contained in search warrants. In United States v. Melanchon, 462 F.2d 82 (5th Cir. 1972) the Fifth Circuit Court of Appeals upheld a search warrant in which a wrong numerical address was given. The Court stated, "An error in description is not automatically fatal to the validity of a search warrant." Id. at 94.

The Fifth Circuit Court of Appeals upheld the description contained in the search warrant in United States v. Darensbourg, 520 F.2d 985 (5th Cir. 1975) in which a wrong street address was given. Having reviewed these decisions, the Fifth Circuit Court of Appeals in United States v. Avarello, 592 F.2d 1339 (5th Cir. 1979) upheld a search warrant's description despite the fact that the wrong city was specified in the body of the search warrant.

As in this case, the premises to be searched were correctly listed in the captions of the search warrant and the affidavit. Furthermore, a detailed description of the premises to be searched, in that case, an apartment, was contained in the body of the search warrant, just as a detailed description of the premises to be searched was contained in the body of this search warrant.

The Court of Appeals for the Fifth Circuit found that when all of these factors were considered together, the description ". . . foreclosed the likelihood that a Dallas location would be mistakenly searched because of a single incorrect specification." Id. at 1344. In this case, the detailed descriptions in the warrant and the affidavit likewise foreclosed the possibility that the wrong location would be searched.

In support of its holding the Court of Appeals of Georgia cited Fomby v. State, 120 Ga. App. 387 (1969). In upholding the description given in that warrant, the Court noted that "The searches were limited in their scope to physically described persons in a specified vicinity." Id. at 387, 388. An examination of the search in the instant case would show a similar limitation as to the scope of the search, thus meeting Fourth Amendment requirements prohibiting "general warrants."

The description of the premises to be searched in the affidavit and the search warrant were unambigious and sufficient to enable an officer to identify the place to be searched with reasonable effort. Therefore, the Court of Appeals properly upheld the validity of the search warrant.

Assuming for the sake of argument, that the search warrant was defective, it should be noted that the Court of Appeals of Georgia also addressed the question of Petitioners' standing to contest the validity of the search and seizure conducted in this case. The court noted that under this Court's decision in Rakas v. Illinois, ___U.S.___, 99 S.Ct. 421 (1978) "a person who is aggrieved by an illegal

search and seizure only through the introduction of damaging evidence secured by search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." On the basis of the evidence presented in this case, the Court of Appeals of Georgia determined that the Petitioners' Fourth Amendment rights were not violated because they had no "legitimate expectation of privacy" in the area which was searched. The Respondent asserts that regardless of the validity of the search warrant in this case, the Court of Appeals of Georgia properly determined that Petitioners' had no standing to object to the allegedly illegal search and seizure.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioners a writ of certiorari as none of Petitioners' Fourth Amendment rights were violated by the issuance of the search warrant by a Justice of the Peace of Liberty County, Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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This 28th day of February, 1980.

Susan V. Boleyn
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